Supreme Court No. 93938-1
COA No. 47736-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER P. KNIGHT,

Petitioner.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is Alexander Knight, the Defendant and Appellant in this case, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Knight seeks review of Division Two's unpublished opinion in *State v. Knight*, No. 47736-0-II, filed November 8, 2016. No motion for reconsideration has been filed in the Court of Appeals. A copy of the unpublished opinion is attached hereto in the Appendix at A1 through A14.

C. ISSUE PRESENTED FOR REVIEW

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. Alexander Knight was convicted of child molestation in the first degree for rubbing his hand between M.P.'s buttocks outside her clothing for a short duration and asking her to kiss him. When touching is over the clothing, the State must produce additional evidence of sexual gratification. Viewing the evidence in the light most favorable to the State, was there was sufficient evidence to uphold conviction for child molestation in the first degree?

D. STATEMENT OF THE CASE

M.P. lived with her mother in a duplex in Vancouver, Washington. 6Report of Proceedings (RP)[1] at 647. M.P.'s mother stated that her daughter would frequently go to her neighbor Chris Knight's house to play with his daughters, A.K. and K. K. 1RP at 648, 649.

On June 28, 2014, Brandy Jennings, a neighbor of M.P., saw M.P. running out of a duplex and going back toward her own house. 6RP at 629. Ms. Jennings said that she also saw a man run out of the same duplex—while calling after her and using hand gestures and that he tried to talk to M.P. 6RP at 630-31. She stated that M.P. did not appear to want to stop and talk to him. 6RP at 631. She said that M.P. briefly paused but that she was unable to hear what the man said to M.P. 6RP at 632.

Ms. Jennings she later texted with M.P.'s mother about the

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[1] The record of proceedings consists of eight volumes and is designated as follows:
1RP July 11, 2014, (arraignment), November 17, 2014, (RCW 9A.44.120 hearing, CrR 3.5 hearing);
2RP November 18, 2014, (first trial);
3RP November 18, 2014, (first trial);
4RP November 19, 2014, (first trial);
5RP December 2, 2014, December 5, 2014, December 31, 2014, March 10, 2015, (motion hearings);
6RP April 13, April 14, 2015, (second trial),
7RP April 14, 2015, (second trial); and
8RP April 15, 2015, (second trial); May 29, 2015, (sentencing).

incident after she saw police cars in front of the house where M.P. lived with her mother. 6RP at 634. Exhibits 16 and 17. She identified the man she saw on June 28 as Alex Knight. 6RP at 637.

Ms. Jennings stated it was not unusual to see M.P. running in the neighborhood, but that she had not previously texted M.P.'s mother on those occasions. 6RP at 639, 644.

M.P. testified that she played with her friend K. and A. at the house of their father–Chris Knight–the previous summer. 6RP at 673-74. She said while she was there with K. and K.'s father and Alex Knight, who is the uncle of K. and A. 6RP at 674. She said that on that day Chris Knight left the house and that she was alone with Alex Knight in the living room. 6RP at 676. She said that he picked her up and put her on his lap and "started rubbing on her butt." 6RP at 678. When asked where he rubbed, she stated "I don't remember where exactly, but he was, like, getting closer and closer to my perineum." 6RP at 678. M.P. explained that the perineum is the area "between your private area and your butt." 6RP at 678. She stated that she learned the term when she and her mother looked it up on the internet. 6RP at 678.

M.P. testified that she did not remember how long this contact took place and how many times his hand had moved. 6RP

at 679. She stated that he then asked her to kiss him and that she hopped off his lap at that point. 6RP at 679. She testified that she did not kiss him. RP at 680. After that she sat alone on the couch in the living room and waited for Chris Knight to return. 6RP at 680. She walked home and on the way and she stopped because Alex Knight was calling her name. 6RP at 682. After he returned she stopped briefly but did not talk to him, and then continued to her house. 6RP at 682.

When she got home she went and sat on a couch and then later heard a knock at the door. She saw Alex Knight and K. at the door. They asked if she wanted to go outside and play and she told her mother "no." 6RP at 685.

Truly Parsons, M.P.'s mother testified that on June 28 M.P. went to play at K.'s house. 6RP at 649. M.P. came back after an hour and sat on the couch and watched television. 6RP at 651. Approximately 45 minutes later Mr. Knight and K. came to their house and asked if M.P. was there. 6RP at 654-57. She stated that K. wanted to ask M.P. a question, and she said that she said "no," that she did not want to talk. 6RP at 657. K. and Mr. Knight walked away from the house. 6RP at 657. After they left, her mother asked what was going on, and M.P. said that Chris Knight's

brother touched her on the rear and tried to kiss her. 6RP at 659. Ms. Parsons called 911 and subsequently took M.P. to a police station where she was interviewed by detectives. 6RP at 660.

M.P. told police that she was visiting her friend K.K, who was three years old at the time. 7RP at 721, 723. She said that K. and her father went to the store, leaving her with K.'s uncle, Alex Knight. 7RP at 721. She said that as she was leaving, Alex Knight called her over and asked if they could still be friends." 7RP at 738. She said that when K. when to her room to change, Mr. Knight touched her and then then told her to kiss him. 7RP at 721, 729, 732. She said that he pulled her onto his lap and rubbed her on her bottom with his hand. 7RP at 734-35. She told police that this lasted for about ten seconds. 7RP at 739. After he told her to kiss him, she got off his lap and went to sit on the couch until K.'s father returned from the store. 7RP at 736. After K.'s father got back, she said that she had to go home to help her mother with shopping. 7RP at 737. M.P. said that Mr. Knight lived several blocks away from K.'s house, and that he would occasionally babysit, but that it was the first time that she had been left alone with him. 7RP at 723. M.P. told police that during the incident that as Mr. Knight moved his hand it got closer and closer to her "perineum," which she

described as the area between the anus and vaginal area. 7RP at 723. She said that she returned to her house and sat in the living room on the couch with K. and Mr. Knight came to the house. 7RP at 724. After Mr. Knight left, M.P. told her mother that he had touched her. 7RP at 725-26.

Chris Knight, Alex Knight's brother, testified that M.P. is his neighbor and that she is close friends with his daughters A. and K. 7RP at 785. He testified that on day of the alleged offense, M.P. came over to his house to see his daughter K., and Alex arrived later. 7RP at 786. Chris Knight left to drive to a nearby convenience store, while his brother, K. and M.P. remained at the house. 7RP at 786. He said that he bought only cigars, and that he was able to pay for the items immediately and return. 7RP at 787. He testified that the store was located two to three blocks from his house and that he was gone from the house for a total of two to three and a half minutes. 7RP at 787, 790, 791. After he returned from the store, K., M.P. and his brother were in the living room, just as they had been when he left. 7RP at 788. K. did not appear to have had a bath, as M.P. had stated to police. RP at 788. Chris Knight stated that after he returned from the store, M.P. left and went back to her own house. 7RP at 789. He stated that

nothing seemed unusual or out of the ordinary. 7RP at 789.

Alex Knight testified that he walked from his house to his brother's house on June 28, 2014, between 11 a.m. and noon. 7RP at 793. He said that M.P. and K. were playing and running in and out of the house while he was playing games on a computer in the living room. 7RP at 794. Chris left to go to the convenience store and he and K. and M.P. were in the living rom. 7RP at 794. K. was not in the bath tub and she did not take a bath while Chris was gone. 7RP at 794. Mr. Knight stated that the girls were both running around and he was laughing and joking with them and he tickled M.P. when they were playing. 7RP at 795. He said that M.P. kissed him, and that after that he immediately stepped back and told her that it was inappropriate and that she should not be kissing anyone except people in her family. 7RP at 795, 800. He said that after she kissed him and admonished her, he sent her home. 7RP at 800. He denied that the touched M.P.'s bottom. He said that his brother was gone not more than three to four minutes and probably less than that. 7RP at 796. He said that the store was nearby and that he could walk there in five minutes. 7RP at 796. He said that after he told her go home, M.P. was pulling on her shoes and getting ready to leave when Chris returned from the

store in his pickup truck. 7RP at 797, 801. Approximately half an hour to 45 minutes after M.P. left, Alex Knight walked with K. to M.P.'s house. 7RP at 797-98. He testified that K. wanted to invite M.P. to go for a walk because it was a nice day. 7RP at 798. He said that his brother suggested that they go to a nearby park to walk. 7RP at 799. Mr. Knight and K. walked to M.P.'s house. At her house, M.P. first stood behind her mother and then went and sat on a couch. 7RP at 799. When asked, she said that she did not want to come out and that she did not like Mr. Knight. 7RP at 800. He denied that he asked M.P. If they were still friends when he went to her house later that day. 7RP at 802.

E. ARGUMENT

It is submitted that the issue raised by this Petition should be addressed by this Court because the decision of the Court of Appeals raises a significant question under the Constitution of the State of Washington and the Constitution of the United States, as set forth in RAP 13.4(b).

1. THIS COURT SHOULD GRANT REVIEW BECAUSE THERE IS INSUFFICIENT EVIDENCE TO UPHOLD KNIGHT'S CRIMINAL CONVICTION FOR CHILD MOLESTATION IN THE FIRST DEGREE

In all criminal prosecutions, due process requires that the

State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

Here, Knight was convicted of child molestation in the first degree, RCW 9A.44.083. CP 17. The State was required to prove that he had sexual contact with a child under the age of 12 who was not his wife or domestic partner and was at least 36 months younger than him. RCW 9A.44.083(1); CP 1.

"Sexual contact" is defined as the touching of the sexual or other intimate parts of a person done for the purpose of sexual gratification. RCW 9A.44.010(2). The State was thus required to prove Knight touched the sexual or intimate parts of a child under the age of 12 for the purpose of sexual gratification. RCW 9A.44.010(2); RCW 9A.44.083(1); *State v. Stevens*, 158 Wn.2d

304, 309-10, 143 P.3d 817 (2006).

In this case, the State did not prove that rubbing his hand between M.P.'s buttocks was done for sexual gratification. M.P. testified that she was sitting on Knight's lap and rubbed her between the buttocks for a short period of time and that he then asked her to kiss him. 6 RP at 678. A taped interview of M.P. conducted by Detective Deanna Watkins and Detective Julie Carpenter was played to the jury. 7RP at 718-752. Exhibit 14. In the interview, M.P. stated that Knight was rubbing "up and down" her buttocks while sitting on his lap, and that this occurred over her clothes. 7RP at 733. In the taped interview she stated that she was facing away from him, and then was facing sideways when he asked her to kiss him. 7RP at 733-34.

As noted supra, "sexual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party of a third party." RCW 9A.44.010(2). An inference that touching of a child's sexual or intimate parts by an adult was for the purpose of sexual gratification arises when the adult is not related to the child and is not performing a caretaking function. *State v Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), rev. denied, 118 Wn.2d 1013 (1992).

However, when the touching is over the child's clothing or not in a primary erogenous area, additional evidence of sexual gratification is required. *Id.* (and cases cited therein).

The element of sexual gratification clarifies the meaning of the essential and material element of sexual contact. *State v. T.E.H.*, 91 Wn. App. 908, 915, 960 P.2d 441 (1998). The issue here is whether the State sustained its burden of establishing beyond a reasonable doubt that the touching described by M.P. was for the purpose of gratifying sexual desires. Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for sexual gratification.

However, in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the court have required some additional evidence of sexual gratification. *State v. Powell,* 62 Wn. App. 914, 917, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992); See also *State v. Veliz*, 76 Wn. App. 775, 778, 888 P.2d 1289 (1995) (where defendant touched victim over clothing, the State was required to prove that he touched the victim for the purpose of sexual gratification, regardless of whether the area

touched is an intimate or sexual part).

In *Powell*, a man visiting a child's home was lifting the child off his lap when he placed his hand on the "'front' and bottom of her under panties under her skirt." 62 Wn. App. at 916. Another time he touched her thighs outside all of her clothing. *Id.* Division III concluded the State was unable to prove sexual gratification and reversed the conviction for first degree child molestation, noting the first touch was "fleeting" and both were outside the girl's clothing. *Id.* at 918.

Knight's case involves even less contact than in *Powell*, here Knight rubbed in between her buttocks, and the rubbing was over M.P.'s clothing and lasted a very short duration. As noted above, the inference of sexual gratification is not supported when either the unrelated adult touches an erogenous area through clothing or touches an intimate part that is not also an erogenous area. See *Veliz*, 76 Wn. App. at 778.

Cases upholding convictions for child molestation for contact on clothing demonstrate that the evidence necessary to prove the purpose of sexual gratification is not present in this case. In *State v. Harstad*, Division I of the Court of Appeals addressed convictions for molesting two sisters occurring when the defendant was

residing in their mother's home. *State v. Harstad*, 153 Wn.App. 10, 15-16, 218 P.3d 624 (2009). The defendant moved his hands around one child's "private area" while they were under a blanket on the couch, and he was "breathing hard" while he touched her. *Id.* at 19-20. The Court upheld the child molestation conviction even though there was no evidence Harstad touched the child under her clothing. "While the evidence does not show that Harstad touched [the child] under her clothing, Harstad's moving his hand back and forth and his heavy breathing, 'like a whole bunch,' support an inference of sexual purpose to satisfy the sexual contact element of first degree child molestation." *Id.* at 22-23. The defendant also rubbed the other girl's inner thigh very close to her vagina while she was wearing underwear. This evidence was supplemented by her statements that she saw the defendant play with his penis, he wanted her to touch his penis, and he asked to see her "pussy." *Harstad*, 153 Wn. App. at 16, 18 19. Division I concluded the evidence also supported the jury's conclusion that the touching was intended to promote his sexual gratification. *Id.* at 22.

A juvenile defendant touched a girl on the school bus by reaching over the seat and touching her private area three times in *State v. Whisenhunt*, 96 Wn. App. 18, 19-20, 980 P.2d 232 (1999).

The touching was under her skirt but over her body suit, but Division Three found the contact was not equivocal or fleeting and the finding of sexual gratification was supported by the evidence. *Id.* at 24. See also *State v. Young*, 123 Wn. App. 854, 99 P.3d 1244 (2004) (attempted child molestation conviction affirmed when defendant put his hand underneath child's pants to try to feel her buttocks, repeatedly tried to place money in her belt, told her "you know what you have to do for it," and tried to undo her belt), aff'd 160 Wn.2d 799, 161 P.3d 967 (2007); *State v. Price*, 127 Wn. App. 193, 196-97, 110 P.3d 1171 (2005) (pinching a 4-year-old's vagina on the outside of her clothing was not fleeting or inadvertent when it caused redness and swelling), aff'd, 158 Wn.2d 630, 146 P.3d 1183 (2006).

Here, the State presented evidence of a touching for a short duration—M.P. told police that she sat in Knight's lap for approximately ten seconds--of the area between M.P.'s buttocks before Mr. Knight asked M.P. to kiss him. 7RP at 733, 739, 740. Under *Powell* and *Veliz*, the State failed to establish that the touching was done for the purpose of gratifying sexual desires, with the result that the State has failed to establish all the essential elements of the crime of child molestation in the first degree beyond

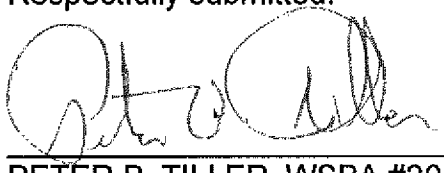
a reasonable doubt.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E of this petition and reverse and dismiss Knight's conviction consistent with the arguments presented herein.

DATED this 6th day of December, 2016.

Respectfully submitted:



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CERTIFICATE OF SERVICE

The undersigned certifies that on February 26, 2016 that this Petition for Review was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies was mailed to the Alexander P. Knight, Appellant, and Rachel Rogers Probsrfeld, County Deputy Prosecuting Attorney by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 6, 2016.

PETER B. TILLER

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

November 8, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALEXANDER PAUL ANDREW KNIGHT, Appellant.	No. 47736-0-II UNPUBLISHED OPINION

JOHANSON, J. — Alexander Knight appeals his jury trial conviction for one count of first degree child molestation. Because the trial court properly found sufficient indicia of reliability to admit the victim's statements and because the State presented sufficient evidence for a rational jury to find Knight had sexual contact with the victim, we reject Knight's contrary arguments, and we affirm the conviction.

FACTS

I. BACKGROUND FACTS

In June 2014, nine-year-old M.P.[1] went to play with her friend and neighbor, K.K. Knight, who is related to K.K., was at K.K.'s home during the visit.[2] After M.P. returned home, Knight and K.K. appeared at M.P.'s door to ask Truly P., M.P.'s mother, if M.P. was home. They left when M.P. refused to come to the door. M.P. then told Truly that Knight had touched her buttocks and tried to kiss her while she was at K.K.'s home that day. M.P. rubbed her hand up and down between her buttocks to show her mother what happened. M.P. later described Knight's hand as rubbing closer and closer to her "perineum," the "flap of skin" between "your private area and your butt." 6 Report of Proceedings (RP) at 678. As it went closer to her perineum, Knight's hand also went deeper.

Truly called 911 and brought M.P. to a police station where Detectives Julie Carpenter and Deanna Watkins interviewed M.P. The State charged Knight with first degree child molestation.

II. *RYAN*[3] HEARING

Before trial, the State moved to admit into evidence M.P.'s statements to her mother and the detectives describing the sexual contact. At the hearing, M.P., her mother, and the detectives

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[1] We use initials instead of names for victims of sex crimes to protect their privacy. Gen. Order 2011-1 of Division II, In re Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases (Wash. Ct. App.), http://www.courts.wa.gov/appellate_trial_courts. Also, because of the nature of this case, some confidentiality is appropriate. Accordingly, the last name of M.P.'s mother will not be used in the body of this opinion.

[2] Knight is more than 19 years older than M.P.

[3] *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

testified. M.P. testified that she knew the difference between the truth and a lie and recounted what she told her mother and the detectives. She told the court that Knight touched "[her] behind" and asked her "to give him a kiss." 1 RP at 26. Knight limited his cross-examination of M.P. to a series of questions attempting to determine whether M.P.'s answers had been coached.

Truly testified that M.P. sat quietly when she returned home from K.K.'s house until Knight, accompanied by K.K., knocked on Truly's door about 45 minutes later. When M.P. heard Knight's voice, M.P. "curled up" and seemed stressed. 1 RP at 21. Knight inquired if M.P. was home so that K.K. could ask her a question. Truly asked M.P. twice if she wanted to go outside, but M.P refused. After Knight left, Truly asked M.P. what was wrong, but M.P. did not want to talk and said she was "'scared.'" 1 RP at 18. M.P. eventually told her mother that Knight had "'touched [her] butt'" and "'tried to kiss [her],'" and M.P. ran her hand "up and down the crack of her bottom" to show her mother how Knight touched her. 1 RP at 18.

Detectives Watkins and Carpenter each testified that they had been trained to interview young children without asking suggestive questions. When the detectives interviewed M.P., they had ensured that M.P. knew what a lie was and the importance of telling the truth and not guessing.

The trial court listened to the recording of M.P.'s interview. During the interview, M.P. told the detectives that while K.K.'s father went to the store that day, Knight had grabbed her and tickled her roughly. Knight put her on his lap and rubbed his hand "up and down [her] butt" over her clothes. Ex. 2 at 13. As Knight touched M.P., his hand neared her "perineum."[4] Ex. 2 at 21.

[4] M.P. showed the detectives how Knight touched her. Detective Carpenter described the motion that M.P. demonstrated as a "cupping" or "spooning motion with [M.P.'s] full hand" that went "back and forth." 1 RP at 45.

The rubbing made her feel "weird"; it lasted for about 10 seconds. Ex. 2 at 17. Then Knight turned M.P. around and told her to kiss him. M.P. stood up instead. Knight told her not to tell anyone or he would get into trouble. When K.K.'s father returned home, M.P. left.

Knight challenged the admission of a statement that M.P. made to the detectives for lack of spontaneity. Knight argued that Detective Watkins's question of whether Knight had told M.P. to keep the incident a secret suggested M.P.'s answer: that Knight told her that he would get into trouble if she told anyone. Knight also noted a "suggestion" that M.P. kissed Knight, but said that he "[did not] know" if that suggestion amounted to M.P.'s having a motive to lie. 1 RP at 96. Knight agreed that M.P. was "clearly competent" to be a witness. 1 RP at 94.

The trial court ruled that the statements M.P. made to her mother and the detectives had a "fairly high level of indicia of reliability." 1 RP at 109. The trial court determined that there was no motive for M.P. to lie and there was no reason to question M.P.'s credibility or character. The statements were consistent with M.P.'s testimony at the hearing, were made freshly after the incident, and were not suggested by the detectives' questioning. The trial court found M.P. "obvious[ly]" competent and admitted the statements. 1 RP at 108.

III. TRIAL

Knight was tried in April 2015.[5] M.P.'s neighbor, Brandy Jennings; Truly; M.P.; and Detectives Watkins and Carpenter testified for the State. Jennings testified that on the day M.P. went to K.K.'s house, Jennings watched K.K. run back to Truly's residence. Knight called after M.P. to try to talk to her. M.P. paused for only a few seconds before she continued inside. The

[5] Knight's first trial resulted in a mistrial.

interaction seemed strange to Jennings. Truly, M.P., and the detectives testified consistently with their statements at the *Ryan* hearing. Truly added that M.P. had come home unusually early from K.K.'s that day. The jury heard the recording of the detectives' interview of M.P.

At the close of the State's case, Knight moved for dismissal based on the State's failure to prove an element of child molestation—that there was sexual contact. The trial court denied the motion because of the evidence that Knight rubbed M.P. closer and closer to her perineum and that Knight requested that M.P. kiss him.

Knight testified that he never touched M.P.'s bottom and that M.P. kissed him on the lips while he was playing with her and K.K. Knight said he immediately reprimanded M.P. He denied going outside to speak to M.P. after she left. Knight claimed that he and K.K. went to M.P.'s house to ask her if she wanted to come to the park with them.

The jury found Knight guilty of first degree child molestation. Knight appeals, seeking reversal of his conviction.

ANALYSIS

I. CHILD HEARSAY EXCEPTION

A. M.P.'S STATEMENTS WERE PROPERLY ADMITTED

Knight claims that the trial court improperly admitted into evidence, under RCW 9A.44.120 and *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984), M.P.'s statements to her mother and the detectives. We disagree.

We review the trial court's decision to admit child hearsay statements under RCW 9A.44.120 for abuse of discretion. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on

untenable reasons or grounds." *C.J.*, 148 Wn.2d at 686 (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). It is the trial judge who is best able to see the witness while she testifies, notice her manner, and consider her capacity and intelligence. *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). Therefore, the trial court is in the best position to make credibility determinations.

RCW 9A.44.120 allows the admission of an otherwise inadmissible statement made by a child under the age of 10 describing "any act of sexual contact performed . . . on the child" if the child testifies at the criminal proceedings. The court must find that the "time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120(1). *Ryan* provides nine factors to guide the court's analysis in assessing the reliability of the statement at the time of its making. 103 Wn.2d at 175-76. The *Ryan* factors are the following:

> "(1) [W]hether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; . . . (5) the timing of the declaration and the relationship between the declarant and the witness"[;] . . . [(6)] the [lack of any] express assertion about past fact[; (7) whether] cross examination could not show the declarant's lack of knowledge[; (8) whether] the possibility of the declarant's faulty recollection is remote[; and (9) whether] the circumstances surrounding the statement . . . are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

103 Wn.2d at 175-76 (quoting *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982); citing *Dutton v. Evans*, 400 U.S. 74, 88-89, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970)).

Not every factor needs to be met for a statement to be sufficiently reliable; the factors need only be "'substantially met.'" *State v. Woods*, 154 Wn.2d 613, 623-24, 114 P.3d 1174 (2005) (quoting *State v. Swan*, 114 Wn.2d 613, 652, 790 P.2d 610 (1990)).

Knight challenges the admissibility of the statements under seven of the nine *Ryan* factors.

1. APPARENT MOTIVE TO LIE

Knight challenges the first factor—apparent motive to lie. He argues that he reprimanded M.P. for kissing him and that this reprimand motivated her to fabricate a story placing the blame on Knight. But at the *Ryan* hearing, Knight did not testify or otherwise offer his version of events. Although there was a "suggestion" that M.P. had kissed Knight, Knight never developed that suggestion at the *Ryan* hearing.

The trial court found no motive to lie because at the time of the incident, there was no indication that M.P. had any animosity toward Knight. The trial court did not abuse its discretion by finding this factor favored admissibility.

2. DECLARANT'S GENERAL CHARACTER

Knight challenges the second factor—the declarant's general character. He argues that "the record suggests" that M.P. was vague or could not recall some details. Am. Br. of Appellant at 17. But he does not reference any particular portion of M.P.'s testimony and at the *Ryan* hearing, Knight's counsel made no argument about this factor. Because Knight fails to make more than a conclusory argument, unsupported by citation to the record or legal authority, and he failed to raise the challenge below, his argument fails.

3. WHETHER MULTIPLE PEOPLE HEARD THE STATEMENTS

Knight challenges the third factor—whether multiple people heard the statements. He argues that this factor weighs against admission. Knight admits that M.P. repeated the statements she made to her mother. But he argues that the third factor favors exclusion because the statements were initially made to only one person. The third factor, however, is met when a child tells a

substantially similar account to multiple people sequentially. *State v. Kennealy*, 151 Wn. App. 861, 883, 214 P.3d 200 (2009).

At the *Ryan* hearing, Knight made no argument under this factor; he admitted that "[m]ore [than one person] did hear [M.P.'s statements]." 1 RP at 96. As the trial court determined, the third factor was satisfied because M.P. had told her mother and the detectives separate, consistent stories. It was not an abuse of discretion to find this factor favors admissibility of the statements.

4. SPONTANEITY

Knight challenges the fourth factor—the spontaneity of the victim's statements made to the detectives. This challenge fails.

Statements made in response to questions that are neither leading nor suggestive are spontaneous under *Ryan*. *Swan*, 114 Wn.2d at 649; *State v. Henderson*, 48 Wn. App. 543, 550, 740 P.2d 329 (1987). Here, the detectives testified at the *Ryan* hearing (and the recording of M.P.'s interview corroborates their testimony) that the detectives asked open-ended and nonleading questions of M.P. Knight does not claim that any particular question was leading or suggestive nor that any particular answer lacked spontaneity. Instead Knight claims that *any* statements to an investigating police officer must lack spontaneity. He cites no authority for that position.

The trial court did not abuse its discretion when it concluded that M.P.'s statements were not suggested by the detectives. Thus, this factor favors admissibility.

5. THE TIMING OF THE STATEMENT AND RELATIONSHIP OF THE DECLARANT TO THE WITNESS

Knight challenges the fifth factor—the timing of the statement and the relationship of the victim to the testifying witness. He argues that this factor favors him based on his trial testimony that M.P. had a motivation to lie to avoid getting into trouble herself. But as stated, there was no

evidence presented at the *Ryan* hearing that supported a finding that the victim had a motivation to lie. At the hearing, Knight made no concrete argument challenging the timing of M.P.'s statements or her relationship with the witnesses, although he said "all sorts of theoretical arguments" could be made. 1 RP at 97.

Under this factor, a witness occupying a position of trust with the child enhances the reliability of a statement made by the child to that witness. *Kennealy*, 151 Wn. App. at 884. Police officers typically occupy positions of trust. *Kennealy*, 151 Wn. App. at 884. Here, M.P. made her statements to her mother and two police officers, all people occupying positions of trust. It was not an abuse of discretion to find this factor favored admissibility of the statements.

6. THE LIKELIHOOD THE DECLARANT'S RECOLLECTION IS FAULTY

Knight challenges the eighth *Ryan* factor—whether the possibility is remote that the declarant's recollection was faulty. He argues that this factor favors exclusion. Again, without specifying a particular part of M.P.'s testimony, Knight claims that her testimony was selective, implying her recollection was faulty at the hearing.

In *State v. Leavitt*, the court held that the proper focus is the passage of time between the incident and the disclosure, not the passage of time before the testimony repeating the disclosure. 111 Wn.2d 66, 75, 758 P.2d 982 (1988). In *Woods*, the court discussed whether the victims had normal memories and abilities to perceive at the time of the hearing. 154 Wn.2d at 624.

Here, M.P.'s disclosures occurred on the same day as the molestation. M.P.'s testimony at the hearing also was consistent with her earlier statements. Thus, under both the *Leavitt* and *Woods* analyses, it was not an abuse of discretion to find this factor favored admissibility of the statements.

7. NO REASON TO MISREPRESENT THE DEFENDANT'S INVOLVEMENT

Knight challenges the ninth factor—whether the circumstances surrounding the statement imply the declarant had no reason to misrepresent the defendant's involvement. This mirrors his challenge to the first factor. But because no motivation-to-lie evidence was presented at the *Ryan* hearing, the trial court did not abuse its discretion in finding this factor favored admissibility.

8. LACK OF DISCUSSION OF EACH *RYAN* FACTOR ON THE RECORD

In addition to arguing that the trial court came to the wrong conclusion in applying the *Ryan* factors, Knight argues that the trial court erred when it did not refer to each *Ryan* factor individually. "Not every *Ryan* factor must be satisfied in order for the trial court to find a child's out of court statements reliable." *Woods*, 154 Wn.2d at 625. Thus, the trial court was not required to individually refer to each *Ryan* factor when it determined whether to admit M.P.'s statements.

Here, the trial court properly applied the *Ryan* test and relied on the evidence that M.P. held no animosity toward Knight before the incident, that M.P.'s statements were consistent, that her disclosure to her mother happened on the same day as the molestation, and that the detectives' questions lacked suggestiveness. Considering the evidence before it at the *Ryan* hearing, the trial court did not abuse its discretion when it determined M.P.'s statements had a "high level" of reliability and, therefore, were admissible at trial.

9. COMPETENCY

Knight asserts that the trial court should have considered M.P.'s competency as part of the *Ryan* reliability analysis. He argues that the trial court did not consider competency when it conducted the analysis, although he acknowledges that the trial court found M.P. to be a competent witness. We disagree.

The trial court need not determine whether a child is competent as a precondition to the admissibility of the child's hearsay statements under the indicia-of-reliability analysis. *C.J.*, 148 Wn.2d at 684. "Admissibility under the statute does not depend on whether the child is competent to take the witness stand, but on whether the comments and circumstances surrounding the statement indicate it is reliable." *C.J.*, 148 Wn.2d at 685. The trial court was not required to consider M.P.'s competency in determining whether to admit her hearsay statements. We reject this argument.

In conclusion, the trial court properly considered the *Ryan* factors and did not abuse its discretion when it admitted M.P.'s hearsay statements.[6]

II. SUFFICIENCY OF THE EVIDENCE

Knight challenges the sufficiency of the evidence to convict him of first degree child molestation. He claims that even if a touching occurred, it was over M.P.'s clothing; thus, additional evidence of sexual gratification is required to prove a sexual contact occurred.[7] We disagree because there was sufficient evidence to support a jury finding of sexual contact and sexual gratification.

When a defendant challenges the sufficiency of the evidence supporting his conviction, we must view the evidence in the light most favorable to the State and determine whether any rational

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[6] Because we conclude that the trial court did not err when it admitted M.P.'s hearsay statements, we do not reach Knight's argument that admission of M.P.'s statements was prejudicial error.

[7] Portions of Knight's argument derive from his account that the touching occurred accidentally while he tickled M.P. and that M.P. kissed him. But to the extent that Knight rests his argument on trial testimony contradicted by the State's evidence, Knight misconstrues the standard for a sufficiency of the evidence claim.

jury could have found the essential elements of the crime beyond a reasonable doubt. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). The defendant admits the truth of all the State's evidence in making such a challenge. *Farnsworth*, 185 Wn.2d at 775.

An essential element of the crime of child molestation is "sexual contact." RCW 9A.44.083(1). "'Sexual contact'" is a touching of sexual or other intimate parts "for the purpose of gratifying sexual desire." RCW 9A.44.010(2). Thus, an implicit requirement of convicting a defendant of child molestation is that the State prove the defendant acted with the purpose of sexual gratification. *State v. Stevens*, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006) (citing *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004)).[8]

Intimate parts are those that a person of common intelligence would know are improper to touch. *In re Welfare of Adams*, 24 Wn. App. 517, 520, 601 P.2d 995 (1979). Proof that an unrelated, noncaretaking adult touched a child's intimate part supports an inference of touching for sexual gratification. *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). Additional evidence of sexual gratification is required when the touching is through clothing or is not of a primary erogenous area. *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991). But even if a touching of intimate parts is over clothing, a sexual contact has occurred when the touching is not susceptible of innocent explanation. *See State v. Harstad*, 153 Wn. App. 10, 22, 218 P.3d 624 (2009).

[8] In *Lorenz*, the Supreme Court held that gratification is not an essential element of child molestation, but merely a "definitional term." 152 Wn.2d at 36. But the court has since confined the holding of *Lorenz* to jury instructions and held that the State still has the burden of showing sexual gratification as part of the burden to prove sexual contact. *Stevens*, 158 Wn.2d at 309.

In *Powell*, a young girl testified that a man touched her through her clothing, including hugging her chest and touching her underwear and thighs. 62 Wn. App. at 916. The victim was unable to describe precisely how the man touched her. *Powell*, 62 Wn. App. at 916. The court held that there was insufficient evidence of sexual gratification to convict the man because the touches were fleeting, his purpose was equivocal and susceptible of innocent explanation, and the man made no threats or requests for the victim not to tell. *Powell*, 62 Wn. App. at 918.

In *Harstad*, one victim testified that her father, breathing heavily, rubbed her inner thigh, close to her vagina. 153 Wn. App. at 19-20. Although the touching was not under the victim's clothing, the court held that the combination of the rubbing and heavy breathing implied a sexual purpose sufficient to support a finding of sexual contact. *Harstad*, 153 Wn. App. at 22-23.

Here, a rational jury could expect a person of common intelligence to know that M.P.'s buttocks and perineum are intimate parts. *See Adams*, 24 Wn. App. at 520. From the State's evidence, a reasonable jury could find that the touching was not susceptible of innocent explanation because M.P.'s molestation is more similar to *Harstad* than *Powell*. Unlike *Powell*, the touching here is not equivocal or susceptible of innocent explanation. The State presented evidence that Knight placed M.P. on his lap, that he rubbed M.P.'s buttocks with his hand moving deeper and closer to her perineum, that he asked M.P. to kiss him, and that he later told M.P. not to tell anyone. Such deliberate actions are not the momentary and potentially innocent contact that concerned the *Powell* court.

As in *Harstad*, the jury could rationally infer that Knight touched M.P. for the purpose of sexual gratification. Thus, we hold that sufficient evidence supports a finding of sexual gratification and sexual contact.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.
JOHANSON, J.

We concur:

Bjorgen, C.J.
BJORGEN, C.J.

J
LEE, J.

TILLER LAW OFFICE

December 06, 2016 - 3:14 PM

Transmittal Letter

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Court of Appeals Case Number: 47736-0

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